3d. By this will the absolute ownership of the personal property of Mr. Pennock is given to his widow, with an expression of mere expectation that she will use and dispose of it discreetly as a mother, and that no trust is created thereby.

DECREE, *January* 27, 1853.—This cause came on to be heard on an appeal from the decree of the Orphans' Court of Chester county, and was argued by counsel, and thereupon, on consideration thereof, it is ordered, adjudged and decreed that all the orders and decrees made in the said Orphans' Court, and in this Court, since the appeal from the first decree of the said Orphans' Court sustaining the demurrer of the respondents, and dismissing the bill or petition of the complainants, be vacated and set aside; and that the said first decree of the said Orphans' Court be affirmed, and that the parties do severally pay their own costs.

Philadelphia Nisi Prius. February, 1853.

MARY SMITH *vs.* REBECCA KRAMER.

In the trial of a question of insanity, evidence of hereditary taint is competent to corroborate direct proof.

This action of ejectment, for two messuages in Philadelphia, came on to be tried before Mr. Justice Gibson, at the sittings at Nisi Prius, on the 14th of February, 1853. Both parties claimed under Captain Arrowsmith, a retired mariner, who had attained a competence: the plaintiff, his sister, by descent as the last of her father's issue; the defendant, his housekeeper, as his devisee. The fact in contest was his sanity. There was no evidence of practice or imbecility; but the plaintiff's witnesses testified to acts of sudden and unprovoked passion, violence, wildness, extravagance, and eccentricity; and, in order to corroborate the inference from them, her counsel offered the deposition of Susan Arrowsmith, the widow of one of the testator's brothers, that the testator's father was insane towards the close of his life; that one of the testator's two uncles, on the father's side, was insane, and the other imbecile; that his

two aunts, on the same side, and their children, were insane; that a son of one of them is in a mad-house; and that her own husband was mentally disqualified before his death. The admission of the deposition was opposed, on the ground that the legitimate inquiry was into the state of the testator's mind, not that of another; and that it did not follow, that because the testator's father and his collateral relations were insane, that he must have been so too.

The point was elaborately argued on principle and authority by *Sheppard* and *David Paul Brown* for the plaintiff, and by *G. S. Biddle* and *Pancoast* for the defendant.

GIBSON, J.—I admit the deposition without hesitation, notwithstanding the dicta of Mr. Shelford, (Treat. on Lunacy, 59,) and Mr. Chitty, (Med. Jurisp. 355,) that it is an established rule of law not to admit proof of insanity in other members of the family in civil or criminal cases. Established! When, where, and by whom? Certainly not by the House of Lords in *McAdam* vs. *Walker*, 1 Dow's Par. Ca. 148, the only case cited for it, for the question there was avowedly dodged. That high Court would not shock common sense by affirming the order of the Scotch Court of Session; nor would it gratuitously reverse it, when the decision could be safely put on another ground. The authority of a judgment appealed from, and left in dubio, cannot be very great. Sir Samuel Romilly's argument, against the evidence, was rested on the fecundity and interminableness of collateral issues; and Mr. Chitty seems to have had a glimpse of the same idea, when he said the course is to confine the evidence to the mental state of the party. But every new fact, though it open a new field of inquiry, is not collateral. It may bear directly on the fact in contest; and, where it does so, it is not in the power of the Court to shut it out. A collateral issue is such as would be raised by allowing a party to put a question to a witness on cross-examination, in regard to a fact palpably unconnected with the cause, in order to afford an opportunity to discredit him by contradicting him; but does not proof of hereditary madness bear directly on the condition of the mind, which is the subject of investigation? What if the point had been ruled by the Chancellor and law judges in the House of Lords? Profoundly

learned in the maxims of the law, they were profoundly ignorant of the lights of physiology; yet, free from the presumptuousness of which ignorance is the foster-father, they refused to rush on the decision of a question to which they felt themselves incompetent. Mr. Chitty fancifully puts the solution of questions of insanity on the doctrine of legal presumptions. "As the imputation," he says, "is contrary to the natural presumption of adequate intellect, the deficit should be established by *direct* and *positive* evidence, and not merely be conjectural or probable proof." If that be law, a question of insanity is the only one in which positive evidence is required, and circumstantial evidence to corroborate is rejected. Why is evidence of an old grudge admitted against a prisoner, as a remote proof of malice, if the remote proof of hereditary insanity may not be given by him to rebut it; and why should the presumption of sanity be allowed to overbear the presumption of innocence, the strongest of them all? I admit that hereditary insanity will not itself make out a case for or against a member of the family; but to say that it may not corroborate what Mr. Chitty calls direct and positive proof, without defining it, staggers all belief. In a measuring cast, it ought to prevail. He says harsh conduct, bursts of passion, or displays of unnatural feeling, will not, *of themselves*, establish insanity. Be it so. But because the springs of such actions are concealed, are they never to be laid bare, and shown to be seated in the blood? When it is admitted by Mr. Chitty and Mr. Shelford themselves, that insanity is a descendible quality, they give up the argument. There can be nothing unreasonable in referring wild, furious, and unnatural actions, not otherwise accounted for, to the aberrations of a mind, the reflex of that of a crazy father. Mr. Taylor, a distinguished lecturer on Medical Jurisprudence in Guy's Hospital, London, says that, "in making a diagnosis of a case of insanity, the first question put is commonly in reference to the present or past existence of the disorder in other members of the family. There can be no doubt, from the concurrent testimony of many writers on insanity, that a disposition to the disease is frequently transmitted from parent to child, through many generations. M. Esquirol has remarked, that this hereditary

taint is the most common of all the causes to which insanity can be referred." (Taylor on Med. Jurisp. 502.) M. Esquirol was, in 1838, and perhaps is still, the principal physician of the hospital for the insane at Charenton, in France, and a member of the Royal Academy of Medicine at Paris. His tables of insanity are held in high repute by not only the physicians of France, but of Europe. Well might Mr. Taylor say that these things ought to be borne in mind by medical jurists. The knowledge attained by men, of a subject with which they have grappled all their lives, ought surely to prevail against knowledge gleaned from the hornbooks of a profession to which the gleaners did not belong. Strange that a source of information, open to every one else, should be closed to those who are to pass on the fact. Every man has observed that there are families, through which insanity has been handed down for generations; and why should the probability of hereditary madness be excluded, when probabilities in other cases are weighed; especially when it is known that a proclivity to theft, intemperance, lying, cheating, and almost all other moral vices, are as transmissible as gout, consumption, deafness, blindness, and almost all other constitutional diseases? It is supposed by the million that insanity is a disease of the mind, not of the body. Ridiculous. If it were, it could never be cured; for the mind cannot take physic, or be separately treated; yet the statistics of the insane exhibit a great number of cures; and the time is fast coming when insanity will be considered the most manageable disease that flesh is heir to.

An objection to an inquisition, which does not disclose the specific nature of the ancestor's infirmity, might stand in a different light; but testimony, which brings the fact of madness home to him, ought to be received like evidence of family likeness, which, though less reliable, was allowed to be corroborative proof of paternity in the Douglass Peerage Case in 1767, and again in the Townsend Peerage Case in 1843. Lord Mansfield said in the former, that he had always considered likeness as an argument of a child being the son of a parent; that a man may survey ten thousand people, before he sees two faces exactly alike, and that, in an army of a hundred thousand men, every man may be known from an-

other; that if there should be a likeness in feature, there may be a difference in the voice, gesture, or other characters; whereas family likeness runs generally through all of these; for that in everything there is a resemblance, as of feature, voice, attitude, and action. Might he have not added the diathesis of the brain? He doubtless might if the point had been mooted. In prosecutions for bastardy, the practice in the Quarter Sessions was, in my day, not exactly to give the child in evidence, but to put it before the jury, sometimes by the prosecutor, and sometimes by the putative father. But ancestral irregularity in the action of the brain is more frequently transmitted than any resemblance in form or feature; and it is difficult to imagine an objection to evidence of it for purposes of corroboration.

The defendant excepted to the foregoing ruling; but examined witnesses who had been in familiar intercourse with the testator during many years without having observed anything strange or eccentric in his conduct; and the jury, having been out fifty hours, declared they never could agree; whereupon they were discharged.

Philadelphia Common Pleas. February, 1853.

BOROUGH OF FRANKFORD ET AL. *vs.* LENNIG.

1. The Board of Wardens of the Port of Philadelphia, under the acts of 1803 and 1818, have jurisdiction to authorize the construction of wharves, &c., in the river Delaware, as far north as the mouth of Frankford Creek.
2. But the Board has no jurisdiction out of the tide-way of the river, and cannot authorize such constructions in the creek itself.
3. The Board of Wardens cannot confer any right on the owners of land bordering on the river, to encroach upon its channel, so as to create a *purpresture*, or public nuisance.
4. The owners of land in Pennsylvania, bordering on a navigable river, have not the right of soil to the centre of the stream. They have, however, the right to erect wharves or buildings to ordinary low water mark; and this right, in the port of Philadelphia, is not, it seems, dependent on the license of the Board of Wardens.